Editor's note: 80 I.D. 777

CASEY RANCHES

IBLA 73-321 Decided December 4, 1973

Appeal from a decision by Administrative Law Judge John R. Rampton, Jr., on February 20, 1973, dismissing an appeal from a notice by the District Manager of the Bureau of Land Management, Dillon, Montana, Grazing District, of loss of base property qualifications for grazing privileges.

Affirmed as modified.

Administrative Procedure: Licensing--Grazing Permits and Licenses: Generally--Rules of Practice: Generally

Under the Administrative Procedure Act, if a licensee has made a timely and sufficient application for a renewal of a license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency. This includes

applications for grazing licenses and permits under the Taylor Grazing Act.

Administrative Procedure: Licensing--Grazing Permits and Licenses: Advisory Boards--Grazing Permits and Licenses: Appeals--Rules of Practice: Appeals: Failure to Appeal

A proposed decision of a District Manager which includes a Notice of Advisory Board Adverse Recommendation becomes the final decision of the Department of the Interior on a grazing license application if no appeal is taken in the time permitted by Departmental regulations.

Administrative Practice--Administrative Procedure: Hearings--Rules of Practice: Evidence

Under the Administrative Procedure Act, hearsay evidence is admissible at a hearing if it is relevant, material and not unduly repetitious, but it has little or no weight where the circumstances do not establish its reliability.

Administrative Procedure: Licensing--Grazing Permits and Licenses: Generally

In accordance with regulation 43 CFR 4115.2-1(e)(9)(i), where the evidence establishes that no application for a grazing license was filed for two consecutive years, the base property qualifications for grazing privileges in an allotment are properly found to be lost.

APPEARANCES: Ralph M. Tucker, Esq., Reno, Nevada, for appellant, Gary V. Fisher, Esq., Office of the Solicitor, Billings, Montana, Department of the Interior, for the United States.

OPINION BY MRS. THOMPSON

Casey Ranches (hereinafter referred to as "Appellant") appeals from a decision of Administrative Law Judge John R. Rampton, Jr., affirming a notice of cancellation of its grazing license on the Cross Ranch grazing allotment and loss of its base property qualifications for failure to file an application for that allotment for two consecutive years as required by 43 CFR 4115.2-1(e)(9)(i).

Appellant had a grazing license for the Cross Ranch allotment in 1968. In response to its timely application to renew these privileges for 1969, on December 6, 1968, a "Notice of Advisory Board Adverse Recommendation" was sent to appellant by certified mail requesting its presence at an Advisory Board hearing on January 14, 1969. This notice included the "District Manager's Proposed Decision" which recommended approval of some of the grazing privileges in question, but withheld approval of the application until the applicant's pending trespass cases were settled and certain maintenance work completed. The notice also stated:

> In the absence of a protest within the time allowed, the above recommendation shall constitute the District Manager's decision on your application. Should this notice become the District Manager's decision and if you wish to appeal such decision for the purpose of a hearing before an Examiner, in accordance with 43 CFR 1853, you are allowed thirty (30) days from receipt of this notice within which to file such appeal with the District Manager, Bureau of Land Management.

Appellant neither appeared at the Advisory Board meeting as requested nor protested the decision as permitted. Nor did it appeal. Appellant did not file an application for a grazing license for either 1970 or 1971.

After issuing a notice to show cause why appellant's grazing privileges should not be canceled, on February 25, 1971, the

District Manager for the Bureau of Land Management, Dillon, Montana, issued a notice to Casey Ranches informing it that its base property qualifications on the Cross Ranch allotment were lost because it failed to file an application for a grazing license containing the base property qualification for two consecutive years as required by 43 CFR 4115.2-1(e)(9)(i). 1/

That notice was appealed to the Administrative Law Judge who found that appellant had not filed an application containing the required information for two consecutive years and "that the actions of the District Manager [in issuing the notice of cancellation of the base property qualifications] were in accordance with the regulation." This appeal is from that decision.

Appellant contends that the "Notice of Advisory Board Recommendation" was not a final decision on its 1969 grazing permit application and as a result its 1968 license has never expired. Therefore, appellant argues it had an outstanding term permit, and was not required to comply with 43 CFR 4115.2-1(e)(9)(i).

1/ That regulation provides:

"(9) Base property qualifications, in whole or in part, will be lost upon the failure for any two consecutive years:

"(i) To include in an application for a license or permit or renewal thereof, the entire base property qualifications for active, nonuse, or combination of active and nonuse, except where the base property qualifications are included in an outstanding current term permit, or where the allowable use has been reduced under §§ 4111.4-3(a)(3) and (c), and 9239.3-2(e) of this chapter."

Appellant cites the following provision of the Administrative Procedure Act, 80 Stat. 388, 5 U.S.C. § 558(c) (1970), in support of its position:

> When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

A grazing permit or license under the Taylor Grazing Act, 43 U.S.C. § 315(h) (1970), is a license within the meaning of the Administrative Procedure Act. Frank Halls, 62 I.D. 344, 346-47 (1955). If the conditions of the quoted provision have been met, the 1968 license would still be in effect. Cf. Pan-Atlantic Steamship Corp. v. Atlantic Coast Line R. Co., 353 U.S. 436, 439 (1957). See this Department's regulations in this respect. 43 CFR 4.470(b), 4.477. As stated, however, in the December 6, 1968, notice to appellant, that notice was to become final if no protest or appeal was made in the time provided. Since appellant failed to comply with the decision and failed to protest or appeal timely, the proposed decision of the District Manager automatically became the final decision of this Department immune from subsequent appeal. 43 CFR 4.470(b); Beryl Shurtz, 4 IBLA 66, 70-71 (1971); Richard McKay, 2 IBLA 1, 6 (1971); Malvin Pedroli, 75 I.D. 63, 67 (1968). The Administrative Procedure Act did not operate to prevent the 1968 license from expiring. Therefore, appellant did not have a valid current term permit, and was required

to comply with 43 CFR 4115.2-1(e)(9)(i), or suffer the loss of its base property qualifications pursuant thereto.

The remainder of appellant's contentions purportedly explain its noncompliance with the regulation. We do not find any of them sufficient to prevent the cancellation of its base property qualifications.

Appellant contends that Glade Stringer tendered, on its behalf, an application for the Cross Ranch allotment, but BLM personnel improperly refused to accept the application. Despite efforts to locate him, Stringer did not testify at the hearing. In an affidavit, offered into evidence but rejected by the Judge in his Order of October 24, 1972, Stringer stated that he attempted to file an application for a grazing permit for the Cross Ranch allotment in 1970, and that he was advised by BLM employees that Casey Ranches was the proper person to make application.

The refusal by the Administrative Law Judge to admit the affidavit into evidence was incorrect. To that extent only, the Judge's decision is modified. However, as will be shown, there is no reversible error. The Administrative Procedure Act (APA) says in part, "Any oral or documentary evidence may be received, but the Agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or

unduly repetitious evidence." 5 U.S.C. § 556(d) (1970). Hearsay evidence, under this provision, is admissible if it is relevant, material and not unduly repetitious. Richardson v. Perales, 402 U.S. 389, 409 (1971); United States v. Stevens, 76 I.D. 56, 59-60 (1969); see cases collected at 6 ALR Fed. 97-98 (1971). Stringer's affidavit is relevant and material to the issue of whether the application required by 43 CFR 4115.2-1(e)(9)(i) was filed. It is not unduly repetitious.

Under the APA the Agency has all the powers in reviewing an appeal from a decision of an Administrative Law Judge as it would have in making an original decision, including making findings of fact, except as it may limit the issues on notice or by rule. 5 U.S.C. § 557(b) (1970); United States v. Middleswart, 67 I.D. 232, 234 (1960); United States v. Little, A-30842 (Feb. 21, 1968). This Board, acting for the Agency in reviewing the initial decision of the Administrative Law Judge, will consider the affidavit in making our findings of fact. United States v. Nelson, 8 IBLA 294, 296 (1972).

Sam Short, an employee of the Dillon Office of the BLM testified that Stringer never tendered or filed an application for the Cross Ranch allotment. Transcript (Tr.) at 26, 27, 29, 33. This testimony was made under oath and subject to cross-examination. Appellant's

contrary position is somewhat supported by Stringer's hearsay affidavit, although, in any event, the language in the affidavit is subject to a more limited interpretation than appellant would give it. Stringer was stated to be in default on his contractual obligations with appellant and he actively avoided being served with a subpoena to testify at the hearing. The APA says a decision must be supported "by reliable, probative and substantial evidence." 5 U.S.C. § 556(d) (1970). To aid the fact-finder in determining whether evidence is reliable and probative, the APA provides that "[a] party is entitled * * * to conduct such cross-examination as may be required for a full and true disclosure of the facts." Id. Cross-examination, among its other functions, tests the veracity and memory of a witness. Stringer did not testify at the hearing, so his veracity and reliability were not tested or established by cross-examination. Furthermore, the confusion in his statement mentioned above could not be clarified through cross-examination. Under the circumstances, Stringer's reliability and veracity cannot be assumed, and the affidavit has little or no weight. Richardson v. Perales, supra; Consolidated Edison v. NLRB, 305 U.S. 197 (1938). The reliable and probative evidence on the issue of tender of the application by Stringer is Short's testimony that no application was tendered. We conclude that the Administrative Law Judge's finding on this issue was correct despite the improper exclusion of the affidavit.

Appellant alternatively attributes its failure to file an application to the existence of illegal conditions imposed in the December 6, 1968, "Notice of Advisory Board Adverse Recommendation," as prerequisites to the issuance of its 1969 license and the refusal of a BLM employee to accept any future application until these conditions were met. (Tr. 90, 91.) Review of the conditions imposed by the December 8, 1968, notice is precluded by appellant's failure to protest that notice within the time permitted by the regulation. Beryl Shurtz, supra; Malvin Pedroli, supra. We also find that while the record shows that John Casey, appellant's President, may have been told that no future application would be "honored," that is, approved, until the conditions were met, such advice did not prevent him from filing an application. An application is filed if the document is delivered to and received in the proper office of BLM. 43 CFR 1821.2-2(f). There is no evidence that such a document was ever delivered to the BLM office for Casey Ranches during the years in question. Any oral advice by an employee is merely tentative, and cannot excuse appellant's failure to take the simple steps necessary to prevent the operation of regulation 43 CFR 4115.2-1(e)(9)(i). In addition, the record shows that appellant relied on Glade Stringer to make the necessary BLM applications and that Stringer, not the BLM, occasioned the failure to file. (Tr. 104.)

The decision that appellant's base property qualifications have

been lost as to the Cross Ranch allotment was proper since the evidence indicates that appellant did not file an application for a grazing license for two consecutive years.

We have also considered appellant's other contentions and find they are without merit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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Joan B. Thompson, Member

We concur:

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Douglas E. Henriques, Member

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Joseph W. Goss, Member